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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 653

THOMAS S. GIBSON, ET AL.,

APPELLANTS,

v.

L. M. BERRYHILL, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

MOTION TO AFFIRM

Appellees, Plaintiffs below, pursuant to Rule 16 of the Revised Rules of The Supreme Court of The United States, move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The unanimous opinion of the three-judge District Court is not yet reported. A copy of the opinion, judgment, and order of the Court is attached as Appendix

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1253.

QUESTION PRESENTED

Whether the District Court erred in restraining and enjoining Appellants, Defendants below, individually and as members of the State Board of Optometry of the State of Alabama and their successors in office, from conducting a hearing on charges preferred against Appellees to revoke their licenses to practice optometry within the State of Alabama, when the Board members had previously asserted Plaintiffs guilty of the offenses charged and also had a pecuniary interest in the result of the proposed hearings.

STATEMENT

PROCEDURAL HISTORY

This is a direct appeal from the final order and judgment entered by a three-judge District Court convened pursuant to 28 U. S. C. §§ 2281 and 2284.

The action was brought by Appellees, Plaintiffs below, optometrists duly licensed to practice in Alabama and who were employed by a corporation, against the Defendants, Appellants, members of the State Board of Optometry and who are in private practice, asking the District Court to enjoin Appellants, Defendants, from conducting a hearing on charges theretofore preferred against the Plaintiffs, and from revoking or suspending the licenses of Appellees to practice optometry in Alabama.

Plaintiff-Appellees, alleged in their complaint that the actions of the Defendant Board in seeking to revoke their licenses to practice optometry in Alabama de

prived them of the right to engage in their chosen profession and earn a livelihood, contrary to the due process clause of the Constitution of the United States.

DECISION OF THE DISTRICT COURT

Upon written stipulation of the parties (Appendix B), the three-judge District Court enjoined the scheduled hearings before the State Board of Optometry, holding that the application of Section 206, Title 46, Code of Alabama, as to the Plaintiffs, violated the Plaintiffs' rights to due process because the Defendants were possibly biased or prejudiced and had a pecuniary interest in the outcome of the proceedings.

ARGUMENT

The decision below presents one Federal question, which was correctly decided, thereby presenting here no substantial question needing further argument. The District Court held that the evidence presented by the stipulation of facts and exhibits thereto showed that Defendants, Appellants, were possibly biased so that they could not conduct the fair, impartial hearing required if Plaintiffs were to be afforded the due process of law guaranteed by the Constitution of the United States. The District Court quoted from *In re Murchison*, 349 U. S. 133, as follows:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and rela-

tionships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U. S. 510, 532, 71 L. Ed. 749, 758, 47 S. Ct. 437, 50 A. L. R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U. S. 11, 99 L. Ed. 11, 75 S. Ct. 11."

The stipulated evidence upon which the decision was based clearly shows the bias and prejudice which permeated and surrounded the threatened State Board of Optometry hearings. Section 192 of Title 46, Code of Alabama 1940, provides that members of the Alabama State Board of Optometry shall be "a member in good standing of the Alabama optometric association, incorporated, or its legal successor." It is undisputed that Appellants, present members of the State Board of Optometry, were selected in accordance with Section 192 as members have been selected in the past. The By-laws of the Alabama Optometric Association prohibit membership of *any optometrists* who are *employed by corporations;* thereby excluding Plaintiffs from membership in the Association from which Board members of the profession's governing body, under Alabama law, must come.

It is stipulated in paragraph 7 of the Stipulation that the Alabama Optometric Association consists of ap-

proximately 100 members and that the dues paid by members are used to finance Association activities, and to defray legal expenses of investigating and initiating and prosecuting charges against the corporation-employed optometrists who are the Plaintiffs in this action. The Alabama Optometric Association and State Board have for several years been engaged in eliminating *"corporate practice"*, in which the Plaintiff-Appellees, are alleged to be involved, either by being employed by Lee Optical Company or by practicing optometry on Lee's premises. In 1965 the Alabama Optometric Association procured the repeal of Section 210 of Title 46 Optometry Code of the State of Alabama, which section had required any optical dispensary in which eyes were tested to be under the supervision of a registered optometrist. Appellants Gibson, Carlton, Smith, Ashbee and Warr (State Board members) contributed to a legislative fund raised by the Alabama Optometric Association to lobby the repeal of these sections; the repeal of which makes the Plaintiff-Appellees', practice illegal. [Under Appellants' theory]

Appellants Gibson, Ashbee, Carlton, Warr and Smith, presently members of the State Board of Optometry, are also members of the Alabama Optometric Association (Stipulation, Par. 6, Appendix B). Dr. Thomas S. Gibson was a member of the legislative committee of the State Association in 1965 and also a member of the State Board of Optometry. In 1965, as president of the Board of Optometry, Dr. Gibson signed a sworn complaint in a civil suit which sought to prohibit these same Appellees from practicing optometry in Alabama. (Appendix D) At the time of filing of the civil action in State Court against Plaintiff-Appel-

lees, Appellants Gibson, Ashbee, Carlton and Smith were members of the State Board. The civil suit alleged that Plaintiff-Appellees, were guilty of lending their licenses to a corporation, employing cappers and steerers and various other offenses. The administrative charges, prosecution of which was enjoined by the District Court, were based on the same offenses as those the Board had declared Plaintiff-Appellees, guilty in the earlier filed civil suit. See affidavit of Roy C. Adams (Appendix E)—the basis of charges to be heard by the Board.

Subsequent to verification of the bill of complaint by Dr. Gibson in the civil suit, charges were made against the Plaintiffs, Appellees, which were to be heard and decided by the same State Board of Optometry, comprised of Appellants Gibson, Ashbee, Carlton, Warr and Smith, all private practitioner members of the Alabama Optometric Association. The object of Board charges obviously was the revocation or suspension of the Plaintiff-Appellees' licenses; this being the only disciplinary measure available by law to the State Board of Optometry.

On the stipulated facts the District Court correctly observed:

> "In the instant case, there is evidence that those who are to judge the matters of suspension of licenses in the state administrative body have indicated their preconceived opinion in the case and that Lee Optical, for whom Plaintiffs [Appellees] worked, issued over 75,000 eyeglasses in one year. Presumably, if Plaintiffs' activities are suspended, Defendants would share in this annual business. . . ."

The only substantial Federal question possibly presented is whether the District Court erred in enjoining Appellants from proceeding with pending hearings. Certainly, Appellees would have been denied the right to a fair hearing before a fair and impartial tribunal and therefore subject to deprivation of their licenses to practice optometry without due process of law had the scheduled hearings been held.

The District Court, in enjoining the Appellants, held Sections 192 and 206 of Title 46, Code of Alabama, unconstitutionally applied as to these Appellees; the Court stating:

> "Pleadings and uncontradicted evidence in the instant case indicate that Plaintiffs have been actively practicing their professions since prior to 1965 and that the cases against them have been pending since that time, that the individuals who will act as judges of their cases are largely the same individuals who in 1965 supported prosecution of Plaintiffs for the very acts for which they are now being charged; . . .
>
> * * *
>
> "Nonetheless, this Court is of the opinion that the statute places the fate of Plaintiffs, as practicing optometrists, in the hands of persons who have apparent personal interest in the matter in controversy. This invades the very core of due process of law.
>
> ". . . It is, therefore, the conclusion of this Court that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their prop-

erty, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events. Miller v. Aldridge, 212 Ala. 660, 103 So. 835; Mack v. Florida State Board of Dentistry, 296 F. Supp. 1259."

Appellants at pages 16 through 21 of their discussion of "questions presented" state that the District Court has held, the State optometry statute unconstitutional per se. While the Alabama Supreme Court did in *McCrory v. Wood*, 277 Ala. 426, 171 So. 2d 241 hold it prima facie constitutional, *the question of individual Board members' qualifications to hear specific charges* was not presented or considered. A study of *McCrory v. Wood*, and the opinion of the District Court, shows no conflict. In *McCrory v. Wood*, the Court was not confronted with circumstances of any similarity to the factual situation here presented. The stipulated facts in the instant case clearly show bias, prejudice and a lack of impartiality on the part of the would-be prosecutors, judges and triers of fact.

Appellants question the sufficiency of evidence relating to the finding of bias and argue that the case of *Miller v. Aldridge*, 212 Ala. 660, 103 So. 835, is authority for their contention that Appellees should have pursued the State remedy of mandamus to require recusal of biased or prejudiced members of the State Board of Optometry. Appellees submit that *Miller v. Aldridge* does not preclude jurisdiction of Federal Courts to secure constitutionally protected rights of individuals where such rights are threatened. *Ex parte Young*, 209 U. S. 123; *Boddie v. Connecticut*, ___ U. S. ___, 28 L. Ed 2d 113.

Appellants have compounded and confused the basic issue in this action, which is the right of admittedly qualified optometrists to hold specific private employment, and to pursue a chosen profession free from unreasonable interference and unbiased regulation. It is well settled that this right is a property right protected by the Fifth and Fourteenth Amendments to the United States Constitution. See *United States v. Robel*, 389 U. S. 258; *Konigsberg v. State Bar of California*, U. S. Annotated 6 L. Ed. 2d 1328; *Willner v. Committee of Character and Fitness of the Supreme Court of New York*, 373 U. S. 96, Annotation 2 A. L. R. 3d 1254.

Appellants' admitted refusal to recuse themselves from the trial of Appellees in light of their previous involvment in having the law changed to comply with their objectives to stifle competition, establishes beyond cavil that the prosecution by them of the Appellees to revoke their licenses is no more than another step in the process of securing to themselves a captive, noncompetitive optometric business within the State of Alabama.

Appellees' request for recusal of Appellants before filing of the complaint in this action, and indeed the order and opinion of the District Court, are not based upon the mere fact that Appellees and Appellants share the same profession. Qualification and ethics regulations are not involved. What is involved is actual bias and prejudice on the part of Appellants based upon not only an identifiable and specific economic interest far exceeding the normal competition necessarily existing among all who pursue the same profession, but is also based upon specific actions disclosed by the undisputed evidence before the District Court.

New Jersey State Board of Optometry v. Nemitz, 21 N. J. Super. 18, 90, A. 2d 740 is illustrative of Appellees' position. In this case the New Jersey court in a situation similar to the instant one, found that a Board member, who was in direct competition with the accused optometrist, had made a complaint, had obtained services of a patient to act as investigator, and had provided funds, and had therefore, clearly gone beyond his mere official duties and should have disqualified himself.

This Court has not altered its position as to protection of constitutionally protected rights. See *Boddie v. Connecticut*, ...U. S....., 28 L. Ed. 2d 113, in which the following principle is stated:

> "[11] Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. . . ."

Thus, regardless of the constitutionality of the Alabama statute other and in proper circumstances, the acts of the Alabama State Board of Optometry in the posture and circumstances here involved make the statute unconstitutional when applied to these Appellees as Appellants have applied it.

CONCLUSION

It is respectfully submitted that Appellants, members of the Alabama State Board of Optometry and members of the Alabama Optometric Association, were properly enjoined from conducting hearings on the charges theretofore preferred against the Appellees

and from revoking the licenses of the Appellees to practice optometry within the State of Alabama. Appellants, within the bounds of the present record, present no substantial Federal question requiring further argument. The unanimous decision of the District Court is right.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
Sep. 3, 1971
JANE P. GORDON,
Clerk

By .....
Deputy Clerk

L. M. BERRYHILL, ET AL,
Plaintiffs,

VS.

THOMAS S. GIBSON, ET AL,
Defendants.

CIVIL ACTION
NO. 3339-N

ORDER

In accordance with the opinion entered this date, it is the ORDER and JUDGMENT of this Court that:

1. The Motion to Dismiss of the Defendants as amended be, and the same is hereby, denied;

2. Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Milton E. Warr and Willard Smith, individually and as members of the State Board of Optometry of the State of Alabama and their successors in office as such are hereby restrained and enjoined from conducting a hearing on the charges heretofore preferred

against the Plaintiffs and from revoking the licenses of the Plaintiffs to practice optometry within the State of Alabama;

3. Other relief prayed for by the Plaintiffs in this proceeding be, and the same is hereby, denied;

4. The Cross-Claim of the Defendants be, and the same is hereby, dismissed without prejudice.

DONE this 3rd day of September, 1971.

s/ Robert T. Rives
United States Circuit Judge

s/ R. E. Varner
United States District Judge

s/ Frank W. Johnson, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

FILED
Sep. 3, 1971
JANE P. GORDON,
Clerk
By .....
Deputy Clerk

L. M. BERRYHILL, ET AL,
Plaintiffs,
VS.
THOMAS S. GIBSON, ET AL,
Defendants.

CIVIL ACTION
NO. 3339-N

Before RIVES, Circuit Judge, and JOHNSON and VARNER, District Judges

OPINION

VARNER, District Judge:

Plaintiffs in the above cause are licensed optometrists under the state law, Code of Alabama, Title 46 §§190, et seq. In October, 1965, each of the Plaintiffs was employed by Lee Optical Company of Alabama, Inc., or was working on the premises of said corporation in fitting glasses and doing related optometry work in association with the sale by Lee Optical Company, Inc., of glasses to the public. In October, 1965, Plaintiffs were charged by the President of the Alabama Optometric Association with having violated several sections of the Alabama optometry law in a proceeding to be decided by the State Board of Optometry, with the result of suspending or not suspending the licenses of each of the Plaintiffs. The matter of license suspension has been pending since 1965 but has not been actively prosecuted until Plaintiffs were notified in the spring of 1971 by the Board that the matters pending against them would be heard the latter part of May, 1971.

Plaintiffs filed this proceeding requesting a three-judge court to determine the constitutionality of the statute pursuant to which the Alabama Optometric Association seeks suspension of the licenses of the Plaintiffs. Plaintiffs seek an injunction against prosecution of said state proceedings. To this end, a three-judge court has been empaneled. By Cross-Claim, Defendants seek to have this Court revoke Plantiffs' licenses to practice optometry. By agreement, the administrative

prosecution has been suspended pending this proceeding.

Plaintiffs insist that suspension of their licenses would deprive them of the right to seek remuneration from practicing their profession and, therefore, deprive them of their property without due process of law. More specifically, they say the following:

1. That since the individual members of the State Board of Optometry are substantially the same individuals who signed affidavits in 1965 stating, or supporting proceedings charging, that the Defendants (Plaintiffs here) had committed the violations charged in the proceedings, conviction of the offenses charged and suspension of licenses are but predetermined formalities with no element of a fair trial;

2. That the statutes under which Plaintiffs are being prosecuted, as they pertain to the Plaintiffs' rights to appeal from any adverse decision, are unconstitutional, particularly, in providing no method of superseding the suspension of licenses in question pending court review; and

3. That the State Board of Optometry is illegally constituted in that only about one-half of the practicing optometrists of the state may participate in the government of their profession.

The initial question in this case is whether this is such a situation as will require or permit federal intervention to restrain actions of a state court or administrative body. The Supreme Court in several recent cases has indicated federal reluctance to intervene, even to secure federal constitutional rights, in state judicial or ad-

ministrative proceedings unless particular harassment or irreparable injury will result from the state proceeding. The Court in *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), held that there is no irreparable injury if the threat to the plaintiff's federally-protected rights can be eliminated by defense of a single criminal prosecution, that "our federalism" ordinarily precludes an injunction against pending state criminal proceedings, and that the federal courts ordinarily should not intervene by injunction even to protect federally-protected rights without any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief, 91 S.Ct. at 755. While dicta in *Younger* may indicate that the rule of that case does not apply in civil cases, no distinction is made between civil and criminal cases by Congress in the anti-injunction, act 28 U.S.C. 2283. However, it has been held that this statute is not applicable to state administrative proceedings. *Engelman* v. *Cahn*, 425 F.2d 954. The case of *Samuels* v. *Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), indicated that "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and * * * where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." 91 S.Ct. 25, 768. In the case of *Dyson* v. *Stein*, 401 U.S. 200, 91 S.Ct., 769, 27 L.Ed.2d 781 (1971), a district court's injunctive relief to a person charged under the Texas obscenity statute, on the basis of the district court's conclusion that the statute was unconstitutional, was reversed and remanded since injunctive relief was proper only where irreparable injury was

threatened and there was no irreparable injury found by the district court. In *Perez* v. *Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), the Supreme Court held it was improper to interfere with enforcement of a Louisiana obscenity statute by suppressing evidence held to have been improperly seized, since the plaintiff could present his challenge to the seizure in the state prosecution. In *Byrne* v. *Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971), the Supreme Court reversed a Massachusetts District Court enjoining enforcement of the state statute at the instance of the defendant who was under state court indictment for violation of the statute and remanded the case in the light of *Younger* and *Samuels* since there had been no finding that the threat to the plaintiff's constitutional rights was one that could not be eliminated by his defense against a single criminal prosecution. On the other hand, federal courts will enjoin state proceedings, even in criminal cases, to protect federal rights where irreparable injury is threatened or to prevent continued harassment, *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; *Dombroski* v. *Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

Pleadings and uncontradicted evidence in the instant case indicate that Plaintiffs have been actively practicing their professions since prior to 1965 and that the cases against them have been pending since that time, that the individuals who will act as judges of their cases are largely the same individuals who in 1965 supported prosecution of Plaintiffs for the very acts for which they are now being charged; that the statutes under which they are being prosecuted provide no precautions against the Board's acting as investigator, prosecutor, and judge all in the same case and provide

for no supersedeas of suspension of license, pending an appeal; and that the organization charged with judging the ethics of Petitioners and with possibly suspending their licenses, is the State Board of Optometry, a board selected from the state's 100 private practitioners of optometry who must govern the state's 192 optometrists, of whom about 92 work for some other person or entity.

The Alabama Optometric Association is a corporation formed by, and whose membership is limited to, private practitioners of the profession of optometry whose services are available to the public. The State Board of Optometry is an unincorporated Board created pursuant to Code of Alabama, Title 46, §192, and is appointed by the Governor from members in good standing of the Alabama Optometric Association. In Alabama, approximately 100 practicing optometrists are in private practice of optometry and their services are available to the public while approximately 92 optometrists are employed by other persons or other entities. By virtue of the rules of the Association, the employed optometrists may not be members of the Association, and by virtue of said Section 192, no person other than members of the Association may serve on the State Board of Optometry. It follows, therefore, that no optometrist, employed by any other person or entity, may serve on the State Board of Optometry and that, therefore, 92 of the state's 192 practicing optometrists have no right to participate in the government of their own profession.

Code of Alabama, Title 46, §206, provides authority for suspension or revocation of the license to practice optometry within the State of Alabama by the State

Board of Optometry for certain causes in addition to those causes heretofore excluded by the Supreme Court of Alabama in *McCrory* v. *Wood*, 277 Ala. 426, 171 So.2d 241.

The question of possible bias of the Board members in this case is not whether the members are actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. A basic element of justice in America is that the court must avoid, not only evil but, the appearance thereof. The Supreme Court of the United States in *Re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623, wrote the following:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 71 L.Ed. 749, 758, 47 S.Ct. 437, 50 A.L.R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to

perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11."

In the instant case, there is evidence that those who are to judge the matters of suspension of licenses in the state administrative body have indicated their preconceived opinion in the case and that Lee Optical, for whom Plaintiffs worked, issued over 75,000 eyeglasses in one year. Presumably, if Plaintiffs' activities are suspended, Defendants would share in this annual business. Plaintiffs argue that the suspension of licenses of the Plaintiffs is but a matter of form and that, when the same are suspended, no supersedeas being provided, the Plaintiffs will be deprived of an opportunity to practice their profession until relief can be secured from the courts of the State of Alabama.

Supersedeas is within the power of the court without statutory authority therefor. *Huett* v. *Nevins*, 50 So.2d 160, 255 Ala. 37; *Campbell* v. *Byers*, 60 So. 737, 6 Ala.App. 292. Appeal from a judgment, when no statute requires a supersedeas bond to effect a suspension, ordinarily suspends the judgment without such a bond. *Ex Parte Cudd*, 195 Ala. 80, 70 So. 721; *Riley* v. *Wilkinson*, 25 So.2d 384, 247 Ala. 579. Note the evolution of the law associated therewith discussed at 4 Am.Jur. 2d 839, Appeal and Error, §365.

Nonetheless, this Court is of the opinion that the statute places the fate of Plaintiffs, as practicing optometrists, in the hands of persons who have apparent personal interests in the matter in controversy. This invades the very core of due process of law.

Revocation of the license of a professional man to practice his profession, together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the Plaintiffs. No method is provided under the state law to avoid this irreparable damage. There is no necessity for exhausting state administrative remedy unless that remedy would be adequate. *Kelly* v. *Board of Education*, 159 F.Supp. 272. It is, therefore, the conclusion of this Court that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events. *Miller* v. *Aldridge*, 212 Ala. 660, 103 So. 835; *Mack* v. *Florida State Board of Dentistry*, 296 F.Supp 1259.

We turn now to the counterclaim of the Defendants. This matter was not called to the Court's attention at the pretrial hearing and no issue was formulated thereon in the pretrial order. That order limits the issues and controls the course of the action unless modified to prevent manifest injustice, Rule 16, Federal Rules of Civil Procedure. The counterclaim would be no more than a permissive counterclaim as distinguished from a compulsory counterclaim, *Big Cola Corp.* v. *World Bottling Co.*, 134 F.2d 718; *Weber* v. *Weber*, 44 F.R.D. 227; *Non-Ferrous Metal, Inc.* v. *Saramar Aluminum Co.*, 25 F.R.D. 102; *American Samec Corp.* v. *Florian*, 9 F.R.D. 718. We, therefore, conclude that no manifest injustice would result from failure to consider the counterclaim and that the same should be dismissed.

This 3rd day of September, 1971.

s/ Richard T. Rives
United States Circuit Judge

s/ R. E. Varner
United States District Judge

s/ Frank W. Johnson, Jr.
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

L. M. BERRYHILL, et al. Plaintiffs Vs. THOMAS S. GIBSON, et al, Defendants	CIVIL ACTION NO. 3339-N

STIPULATION

It is stipulated by and between the parties as follows:

1. Paragraphs 2, 3 (a), 3 (c), 4, 5 and 6 are admitted by all of the parties, both plaintiff and defendant.

2. At the time notice of the August 1970 hearings were given plaintiffs demanded that the respondent State Board of Optometry recuse itself, a copy of the demand being attached hereto as Exhibit 1. Subsequently the August hearing was postponed by mutual agreement of the plaintiffs and defendant State Board

with the stipulation that neither party's position would be altered by so doing. This agreement is set out as Exhibit 2.

3. Plaintiff optometrists are all licensed, practicing optometrists in the State of Alabama. In October of 1965 when the original charges were preferred against them, they were all employees of Lee Optical Company of Alabama, Inc., a corporation. Lee Optical Company of Alabama, Inc. is a corporation engaged in the business of optical dispensing. It sells eyeglasses at an advertised price. Prior to October 1965 Lee advertised eyeglasses, advertised that it *conducted* or *furnished* eye examination by a registered optometrist on its premises. Exhibit 3 depicts advertisements and photographs of Lee's premises showing the advertising conducted upon its premises. The optometrists employed in the Lee stores were employed on a salary. No charge was made for eye examinations except instances where the patient did not need eyeglasses. In those instances a nominal charge was made for the examination which went into Lee's receipts with the optometrist getting no part of it. A copy of the employment contract in use between Lee and its optometrists at the time of the filing of the charges against the Lee optometrists is attached hereto as Exhibit 4 with deposition testimony of Dr. William B. McCrory who identified the employment contract.

4. In October of 1965 Lee modified its advertising program by taking out of any advertisements any references to optometrical examinations or optometric services. Its ads were directed toward the advertisement of eyeglasses. A copy of the ad in use which is typical of those used since October 1965 is attached hereto as Exhibit 5. The store windows of Lee Optical do not

contain any reference to an optometrist or that an optometrical examination is available inside the store.

5. In April 1970 Lee entered into a new agreement with its optometrists, a copy of which is attached hereto as Exhibit 6. This agreement in substance allowed the optometrist to lease the optometrical office and equipment from Lee, to occupy the space therein for the purpose of conducting eye examinations and to set his fee. Arrangements were made whereby the Lee clerical help collects the fees which are charged, posts them on a balance sheet and Lee remits the fees to the optometrist. There is no other pecuniary arrangement between the optometrist and Lee. All pension plans, withholding tax arrangements, group insurance plans and other employee benefits which had been available to the optometrists through Lee were discontinued as of April of 1970.

Under the present arrangements the optometrist conducts examinations in the leased premises within the Lee Optical dispensary. He does not pay any rent. The consideration to Lee is the availability of an optometrist to examine eyes of patients who come in without prescriptions for glasses. Lee receives no part of the fee for the optometric examination and the optometrist receives nothing from Lee by way of remuneration because of the sale of a pair of eyeglasses. The additional examination fee is now paid by the customer who comes in.

The optometrists in the Lee Optical stores do not advertise optometrical examinations. There is no reference in Lee advertising to the fact that there is an optometrist in the office or on the premises.

6. Defendants Gibson, Ashbee, Carlton, Warr and

Smith, members of the State Board of Optmetry of the State of Alabama are also members of the Alabama Optometric Association. Dr. Thomas S. Gibson was a member of the Legislative Committee of the State Association in 1965 and also a member of the Board of Optometry. As President of the Board of Optometry he signed the complaint in a civil suit, the complaint in which is attached as Exhibit 7 by which he made affidavit as to the truth of certain charges against plaintiffs. Board members at the time of the filing of the complaint against plaintiffs were defendants Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Willard Smith and James L. Cash.

7. The Alabama Optometric Association consists of approximately 100 members. The dues paid by each member are $240 per year; of this $140 goes to the American Optical Association. These dues are used to finance the Association's activities and also to defray legal expenses of investigating and initiating charges against plaintiffs in this action. The Alabama Optometric Association has for several years been interested in eliminating "corporate practice" which the plaintiffs are alleged to be engaged in by being employed by Lee Optical Company or *by practicing on its premises.* In 1965 the Alabama Optometric Association was active in securing the repeal of Section 210 of Title 47 of the Optometry Code of the State of Alabama. This was the section which allowed and required any optical dispensary in which eyes were tested to be under the supervision of a registered optometrist. Defendants Gibson, Carlton, Smith, Ashbee and Warr contributed to a legislative fund raised by the Alabama Optometric Association to promote the repeal of these sections, the

repeal of which allegedly makes the practice of plaintiffs illegal.

8. The State Board of Optometry has no rules or regulations governing the practice of optometry within the State of Alabama. The charges pertaining to the plaintiffs in this instance involve an alleged violation of the State Code regulating the practice of optometry as it presently exists.

9. It is stipulated by and between the parties that Section 210 of Title 47 was repealed August 4, 1965, that charges were initiated by the Alabama Optometric Association against plaintiffs and filed with the State Board October 23, 1965, a copy of the said charges made against each optometrist being the same as Exhibit 8 hereto made against Dr. Harry Sparks, that civil suit was filed by the State Board against plaintiffs and Lee Optical on October 25, 1965, a copy of the complaint and exhibits thereto being attached as Exhibit 7.

10. Attached to the original of this stipulation are depositions of Dr. William B. McCrory and members of the State Board of Optometry taken May 21 and 22, 1970 and it is stipulated that the parties would so testify in this action.

11. It is further stipulated by and between the parties that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against plaintiffs and in his judgment could render a fair and impartial verdict on the charges brought against them.

12. It is further stipulated that each of the plaintiffs, if called to testify, would testify that Lee Optical Company of Alabama, Inc. had never interferred with

his professional practice, called upon him to alter his judgment and that his professional judgment was in no way affected or impaired, nor was his allegiance to his patients impaired or affected by reason of the fact that he practiced on the premises of a dispensing optician.

13. Mr. Gene Shanbaum of Dallas, Texas, Secretary of Lee Optical Company, testified in the trial of *State Board* v. *Lee* in the Circuit Court of Montgomery County that he had checked the records of Lee Optical and that in 1969 Lee sold 75,000 pairs of glasses in Alabama.

14. The Alabama Legislature created the School of Optometry in 1968 to be located in the Medical Complex of the University of Alabama at Birmingham and it is now in its second year of teaching optometry students.

15. Drs. Pillion and Sparks, who had formerly been employees of Lee and now practice as lessees on Lee's premises, testified in the *State Board* v. *Lee* trial that they made more money as lessees of Lee under their present arrangement than they had as a salaried employee for Lee.

16. Dr. Milton E. Warr was appointed to the State Board of Optometry on or about January 1, 1971 and prior to that time had no contact with the charges against the plaintiffs or the suit against Lee Optical Company.

17. The employment agreement which Lee had with its optometrists prior to April of 1970 and the lease arrangement presently in use both contain a 10 day cancellation clause.

18. If called to testify Dr. George R. Carlton, a

member of the State Board, will testify that by-laws of the Association provide that the Association recommend names to the Governor for appointment to membership on the State Board. The Association in years past has made this recommendation, but has rarely been followed by the Governor. In recent years no recommendation has been made. None of the present Board members were recommended by the Association for appointment. There is no provision in the optometry law which allows the Association to nominate Board members.

19. There is no provision in the optometry laws or elsewhere for the appointment of a new Board if the present Board is enjoined from hearing pending charges.

20. The House of $8.50 Eyeglasses has now been decided by the Circuit Court in Birmingham and is in the process of being appealed; a copy of the Circuit Court decree is attached as Exhibit 9.

21. Section 210 of the optometry law was repealed on August 4, 1965. There was no change in the signs and advertising done in all the Lee stores until after the charges here involved were filed on October 23, 1965 and the suit filed against Lee and its optometrists several days later.

22. The State Board of Optometry adopted Resolution No. 1 on June 13, 1971; a copy of the Resolution being attached hereto as Exhibit 10.

23. All exhibits attached to pleadings, briefs or other documents heretofore filed with the court are admitted as to genuineness and what they purport to be for the convenience of the court; however, by admis-

tion of documents of this stipulation, neither of the parties admit the relevance thereof as to the issues.

s/ Douglas E. Bergman
Douglas E. Bergman

s/ Harry Cole
Harry Cole
Attorneys for
Plaintiffs

s/ J. G. L. Marston III

s/ Donald G. Valeska II
Deputy Assistant
Attorneys General

s/ Richard A. Billups, Jr.
Richard A. Billups, Jr.
Attorney for
Defendants

APPENDIX C

§ 192. (2875) State board of optometry; how constituted.—The governor shall appoint a state board of optometry consisting of five persons each of whom shall be a citizen of the United States, over the age of twenty-five years, a member in good standing of the Alabama optometric association, incorporated, or its legal successor, and shall have been engaged in the actual continuous practice of optometry in the State of Alabama for at least five years next preceding his appointment. One member of said board shall be appointed each year for the term of five years and shall hold office until his successor is appointed and qualified. The governor may remove from office at any

time any member of the board for neglect of duty, incompetency, improper or unprofessional conduct, or when the license or certificate of any member has been suspended or revoked. Vacancies on said board shall be filled by appointment by the governor in the manner hereinbefore provided. The governor shall furnish each member of said board at the time of his appointment a certificate of appointment, and each appointee shall qualify by taking the usual oath of office before the judge of probate of his home county within fifteen days from date of his appointment. (Ib.)

§ 206. (2889). License may be suspended or revoked.—A license issued to any person may be suspended for a definite period of time, or revoked by the state board of optometry for any of the following reasons; to-wit: Conviction of any offense involving moral turpitude, in which case, the record of conviction, or a certified copy thereof certified by the clerk of the court or by the judge in which court the conviction is had, shall be conclusive evidence of such conviction. For unprofessional conduct. "Unprofessional conduct" shall be defined to mean any conduct of a character likely to deceive or defraud the public, lending his license by any licensed optometrist to any person, the employment of "cappers", or "steerers" to obtain business, "splitting" or dividing a fee with any person or persons, the obtaining of any fee or conpensation by fraud or misrepresentation, employing directly or indirectly any suspended or unlicensed optometrist to do any optometrical work, by use of any advertising, carrying the advertising of articles not connected with the profession, the employment of any drugs or medicines in his practice unless authorized to do so by the laws covering the practice of medicine of this state, or

the doing or performing of any acts in his profession declared by the Alabama Optometric Association to be unethical or contrary to good practice. When a license or certificate has been obtained by fraud practiced on the board. When the holder of a license or certificate is suffering from a contagious or infectious disease. Gross incompetency. Intemperance in the use of intoxicating liquors or narcotics to such an extent as unfits the holder of the license for the proper practice of optometry. Whenever charges are preferred against any holder of a license the board shall fix a time and place for the hearing of the same, and a copy of the charges, which must be made in writing, and verified by oath, together with a notice of the time and place where they will be heard and determined, shall be served upon the accused at least ten days before the date fixed for said hearing. When personal service cannot be affected, the board shall cause to be published at least thirty days prior to the date set for the hearing in a newspaper published in the county in which accused was last known to practice, a notice to the effect that at a definite time and place a hearing will be held by the board on charges preferred against said person. The board may compel the attendance of witnesses at said hearing; the accused shall have the right to be confronted by the person or persons preferring said charges, to cross-examine the witnesses against him, to be represented by counsel, and to have the testimony taken down by a stenographer, but the expense of counsel and stenographer, either or both, shall be borne by the accused. Witnesses at hearings before the board shall testify under oath and may be sworn by any member of the board. In all cases of suspension or revocation of licenses as herein provided for, the holder may appeal

to the circuit court, or other court of like jurisdiction, in the county in which the person whose license or certificate is ordered revoked resides. (Ib.)

APPENDIX D

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
IN EQUITY
NO. 36715

STATE BOARD OF OPTOMETRY,

Complainant,

v.

LEE OPTICAL COMPANY OF ALABAMA, INC.
a corporation and

Dr. L. M. Berryhill, O. D.
Dr. Richard T. Wood, O. D.
Dr. William B. McCrory, O. D.
Dr. Franklin H. Pearce, O. D.
Dr. J. T. Dumas, O. D.
Dr. B. J. Fitzsimmons, O. D.
Dr. William Baya, Jr., O. D.
Dr. James J. Couch, O. D.
Dr. James A. Miller, O. D.
Dr. Howard W. Smith, O. D.
Dr. J. Harry Sparks, O. D.
Dr. O. L. Wilson, O. D.
Dr. L. Graze, O. D.
Dr. William J. Craig, M. D.

Respondents

BILL OF COMPLAINT

Comes now the State Board of Optometry and respectfully shows unto the Court the following facts:

1. That the State Board of Optometry was created in Alabama pursuant to Section 192 of Title Chapter 11, 1940 Code of Alabama of the Alabama Optometry Law and that Dr. Thomas S. Gibson, Huntsville, Alabama is President and Dr. Willard Smith, Eufaula, Alabama is Secretary and Dr. James L. Cash, Selma, Alabama and Dr. George W. Posey, Jasper, Alabama and Dr. George R. Carlton, Alexander City, Alabama and all constitute the duly appointed and qualified members of the State Board of Optometry.

2. That said State Board of Optometry is authorized to hold examinations and grant licenses to practice optometry in Alabama and brings this action for injunction pursuant to the Alabama Optometry Laws, Title Chapter 11, Sections 190-213, inclusive, 1940 Code of Alabama and the laws of the State of Alabama.

3. That the Lee Optical Company of Alabama, Inc., is an Alabama corporation with its Declaration of Incorporation filed in the Probate Court of Montgomery County, Alabama. That the said Lee Optical Company of Alabama, Inc., operates some fourteen (14) stores throughout Alabama all under the trade name of "Lee Optical" one of which is at 6 Dexter Avenue, Montgomery, Alabama. For ease of reference the respondent Lee Optical Company of Alabama, Inc. will at times be henceforth referred to as Lee Optical.

4. The respondents Dr. L. M. Berryhill, O. D., 6 Dexter Avenue, Montgomery, Alabama; Dr. James J. Couch, O. D., 110 So. Court St, Florence, Alabama;

Dr. Richard T. Wood, O. D., 100 Washington Street, S. E., Huntsville, Alabama,; Dr. William B. McCrory, O. D., 100 Washington Street, S. E., Huntsville, Alabama; Dr. Franklin H. Pearce, O. D., 2306 Memorial Parkway, S. W., Huntsville, Alabama; Dr. J. T. Dumas, O. D., 322 S. Wilson, Prichard, Alabama; Dr. B. J. Fitzsimmons, O. D., 203 Dauphin Street, Mobile, Alabama; Dr. William Baya, Jr., O. D., Springdale Plaza, Mobile, Alabama; Dr. James A. Miller, O. D., 203 Dauphin Street, Mobile, Alabama; Dr. Howard W. Smith, O. D., 206 19th Street, Bessemer, Alabama; Dr. J. Harry Sparks, O. D., 3221 Avenue W (Ensley), Birmingham, Alabama; Dr. O. L. Wilson, O. D., 9121 4th Avenue So., Birmingham, Alabama (Roebuck); Dr. L. Graze, O. D., 212 No. 20th Street, Birmingham, Alabama; Dr. William J. Craig, M. D., 115 No. Foster, Dothan, Alabama, and all of these said respondents have an agreement with the respondent Lee Optical Company of Alabama, Inc., pursuant to which said respondents are located in the various stores owned and operated by the respondent, Lee Optical Company of Alabama, Inc. in the towns and at the addresses immediately shown above and pursuant to said agreement, the exact terms of which are unknown to complaint, these respondents are each in one of the stores operated by the respondent, Lee Optical Company of Alabama, Inc., and under the trade name Lee Optical, for the express purpose of examining the eyes of customers coming into each of said stores and the sale and fitting of glasses to said customers. All of said above named respondents are interested parties and will be adversely affected by a decree in this suit.

5. The complainant, State Board of Optometry, further shows unto the Court that the Alabama Legis-

lature adopted House Bill No. 205 which was signed by the Governor on August 4, 1965 at 11:59 A. M. at which time it became law and said House Bill No. 205, among other things, repealed Section 210 of the Optometry Law as found in Title Chapter 11, 1940 Code of Alabama. Said Section 210 as repealed reads as follows:

> "Nothing in this chapter shall be so construed as to prevent any person firm or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such store, establishment, or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation."

Upon the repeal of said Section 210 and upon the signing of House Bill No. 205 by the Governor, there no longer exists any legislative authority for the respondent, Lee Optical Company of Alabama, Inc., through its numerous stores operated under the trade name of "Lee Optical", to continue operating said stores wherein eyes are examined or glasses fitted.

6. The complainant further shows the Court that promptly following the signing of House Bill No. 205 by the Governor the State Board of Optometry directed its Secretary, Dr. Willard Smith, to notify all optometrists in Alabama of the passage of House Bill No. 205 which repealed Section 210 of the Alabama Optometry Law. Said letter was sent by certified mail, return receipt requested, and said letter together with copy of House Bill No. 205, which is now Act number 218 are attached hereto as exhibits No. 1 and No. 2 and made

a part hereof. Complainant further shows that each of the optometrists named above as respondents herein received a copy of said letter, Exhibit 1 and the enclosure Exhibit No. 2.

7. Complainant would further show that the respondent Lee Optical Company of Alabama, Inc., is not authorized to practice optometry in Alabama through its numerous stores or otherwise but nevertheless advertises that through its "Lee Optical" stores it conducts eye examinations, prescribes, furnishes and fits eyeglasses and holds itself out as practicing optometry all as shown by the picture taken on or about September 29, 1965 of the Lee Optical Store front at 6 Dexter Avenue, Montgomery, Alabama and on the left front window of said store appears the phrase "Eyes examined Glasses Fitted" all as shown in said picture which is attached hereto as Exhibit No. 3 and made a part hereof. Additionally there is a sign in said store which states that the one price of $12.90 includes, among other things, "Your scientific eye examination", all as shown by a picture of said sign taken on or about September 29, 1965 and attached hereto as Exhibit No. 4 and made a part hereon Complainant further shows that respondent through its numerous stores advertises by newspaper, radio and television since August 4, 1965 that it conducts scientific eye examinations as shown by the advertisement appearing on September 10, 1965 in the Florence Times advertising the Lee Optical Store in Florence, Alabama. Said newspaper advertisement is attached hereto as Exhibit No. 5 and made a part hereof.

8. Complainant would further show that said pictures of the Lee Optical Store in Montgomery, Ala-

bama are typical and similar to the store fronts of the other Lee Optical Stores in Alabama and that the newspaper advertisement advertising the Lee Optical Store at Florence, Alabama attached as Exhibit No. 5 is typical and similar to newspaper advertisements of the other Lee Optical Stores in Alabama and complainant will have additional proof as to each and every one of said Lee Optical Stores in Alabama to present on the trial of this cause in support of its allegation that since August 4, 1965 at 11:59 A. M. the respondent Lee Optical Company of Alabama, Inc. is unlawfully practicing optometry in all of its stores in Alabama.

9. Complainant would further show that Lee Optical Company of Alabama, Inc. has contracts of employment, agreements or arrangements with all of the other respondents named above, the exact content and provisions of which are unknown to the complainant but the complainant alleges and verily believes that the same is a scheme, device or arrangement to enable the respondent, Lee Optical Company of Alabama, Inc. to directly or indirectly engage in the practice of optometry unlawfully in the State of Alabama; the complainant further alleges and verily believes that the respondent, Lee Optical Company of Alabama, Inc., pursuant to said scheme, device or arrangement has one of the above named respondent optometrists or physicians present in its said "Lee Optical" stores throughout the State of Alabama for the express purpose of examining the eyes of the customers of the "Lee Optical" stores with resultant sales of eyeglasses on prescriptions issued by said optometrist or physician which sales are either made by the respondent, "Lee Optical", or the said "Lee Optical" receives a commission or some financial profit from same, the exact nature or amount of

which is unknown to the complainant. Complainant further alleges that all sales of glasses are made on sales slips which bear the name of the respondent, Lee Optical; complainant further alleges and verily believes that said optometrists and physicians after making an examination of the customer's eyes and finding that glasses are necessary, will not give to the patient a prescription for the needed eyeglasses which the customer would be free to take to some place of his own choice to have filled, but instead, said doctor insists and demands that any glasses so prescribed by him must be purchased from and sold by the respondent, "Lee Optical". Complainant further alleges and verily believes that the said doctor and each one of the Lee Optical stores make no charge to each said customer for his examination of the eyes of the customers of the respondent, Lee Optical, but that his compensation or remuneration for his services is derived from a contract of employment or some arrangement, unknown to the complainant, whereby he and the respondent, Lee Optical, in some way split or divide the amount charged for eyeglasses sold by the respondent, Lee Optical.

10. The complainant further alleges that the respondent doctors as named above are unlawfully aiding and abetting the respondent, Lee Optical Company of Alabama, Inc. and the individual "Lee Optical" stores served by each and making it possible for the said respondent, Lee Optical Company of Alabama, Inc. to unlawfully practice optometry through its various "Lee Optical" stores throughout the State of Alabama. Section 208 of the Alabama Optometry Law does not authorize a physician, surgeon or oculist to unlawfully engage in the practice of optometry but merely permits

him to lawfully engage in that profession on the faith of his license as a physician.

11. Complainant further alleges that the doctors named above are each practicing optometry under a false or assumed name to-wit: "Lee Optical" in the store that each serves in violation of Section 191 of the Alabama Optometry Law.

12. Complainant further alleges that the doctors named above are soliciting the sale of eyeglasses in violation of Section 203 of the Alabama Optometry Law through the advertising campaign and store signs as presently conducted in behalf of himself and the "Lee Optical" store he serves.

13. Complainant further alleges that the doctors named above are guilty of unprofessional conduct as defined by law in Section 206 of the Alabama Optometry Law in that they are lending their licenses to the "Lee Optical" stores they serve and each one of the doctors named above is employing the "Lee Optical" store as cappers and steerers to obtain business and further the doctors named above are guilty of unprofessional conduct as defined by law in Section 206 of the Alabama Optometry Law in splitting or dividing their fees with the "Lee Optical" store they serve.

14. Complainant further alleges that when a prospective purchaser is drawn into the "Lee Optical" stores by said previously described advertisements, the patient is ushered into the office of the said doctor serving each "Lee Optical" store which is in and a part of the establishment conducted by "Lee Optical" and he makes an examination of the eyes of said patients and writes a prescription for glasses then "Lee Optical"

through its servants, agents and employees and with the help and assistance of the doctor serving the store, immediately attempt to make a sale of eyeglasses to said patient. That as a result of said arrangement, scheme or device the public is misled and deceived into believing that the said "Lee Optical" is qualified to make eye examinations and is in fact conducting and making eye examinations and prescribing glasses as well as selling same and the respondent doctors named above participate in perpetrating said fraud and deception.

15. That as a result of the above alleged acts and their willful, continued and unlawful conduct on the part of the respondents, and each of them, great and irreparable injury will result to the public health and welfare in the State of Alabama unless the respondents, and each of them, are enjoined and prohibited from the unlawful practice of optometry, either directly or indirectly, and the respondent, Lee Optical Company of Alabama, Inc., from employing registered optometrists or physicians, surgeons, or oculists by any means or arrangement, to examine the eyes of the customers of the "Lee Optical" stores they operate throughout the State of Alabama.

16. That as shown above the complainant does not have a plain, speedy, adequate and complete remedy at law.

Wherefore premises considered, the complainant prays that this Honorable Court issue a prohibitory injunction enjoining and prohibiting each of the respondents named herein from the unlawful practice of optometry, either directly or indirectly in the State of Alabama and the respondent Lee Optical Company of Alabama, Inc., from employing by any means or ar-

rangement registered optometrists or physicians, surgeons or oculists to examine the eyes of its customers and prescribe eyeglasses for their "Lee Optical" stores or any other stores owned by it anywhere in the State of Alabama. Complainant also prays for process and for general relief, submits to the jurisdiction of the Court and offers to do equity.

/s/ Thomas S. Gibson
Thomas S. Gibson, O. D.
President
State Board of Optometry

Thomas F. Parker
Theodore H. Hoffman
Richard A. Billups, Jr.

/s/ Thomas F. Parker
Attorneys for
Complainant

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10 High Street Building
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Jackson, Mississippi

STATE OF ALABAMA
MONTGOMERY COUNTY

Before the undersigned, notary public, in and for said County and State personally appeared Dr. Thomas S. Gibson, President, State Board of Optometry, who after being duly sworn, deposed and said that the al-

legations contained in the foregoing complaint are true and correct and acknowledged that he signed the complaint voluntarily this the 23rd October, 1965.

/s/ Thomas F. Parker
Notary Public

APPENDIX E

AFFIDAVIT

I, Dr. Roy C. Adams, Optometrist, Monroeville, Alabama, after first being sworn under oath state as follows:

I am a registered optometrist in Alabama and have practiced my profession at Monroeville, Alabama for a number of years. I am and have been since I started to practice a member in good standing of the Alabama Optometric Association.

I was elected president of the Alabama Optometric Association in 1964 and served in various official capacities in the Association prior to that time.

Upon the repeal of Section 210 of the Optometry law in 1965, the Association wrote a letter to all optometrists advising of this and offered their help to all employed optometrists in optical departments in establishing their own independent professional practice any place they chose in Alabama. No one accepted our help and continued to operate as they had prior to the repeal of Section 210.

After several weeks had passed the Alabama Optometric Assoocation decided to start investigating and gathering evidence to show how these employed optom-

etrists and their employers were not complying with the optometry law as amended. This was done by and at the expense of the Association, its officers and attorneys. The State Board of Optometry took no part in this whatsoever.

After our investigation and evidence gathered showed Lee Optical Company and its employed optometrists to be doing the same as before and what appeared to be in flagrant violation of the amended optometry law, we instructed our attorneys to prepare an injunction suit against Lee Optical Company, as well as others so engaged, and their employed optometrists and also to prepare charges against the employed optometrists setting forth their violation of applicable sections of the optometry law and when this was done, and upon advice of counsel, I signed the charges on October 23, 1965, and they were transmitted to the State Board of Optometry for such action they felt should be taken. At no time did I as president of the Alabama Optometric Association try to dictate what action it should take.

Our attorneys felt the evidence justified the filing of an injunction suit against Lee Optical Company and their employed optometrists—so one was prepared and presented to the State Board of Optometry for their consideration and it was later filed. At no time did I as president of the Alabama Optometric Association try to dictate to the Board that they had to file such an injunction suit or did any one else to my knowledge. The suit was filed voluntarily by the State Board.

Dated this the 2nd day of June, 1971.

s/ Roy C. Adams, O.D.
ROY C. ADAMS, OD

Sworn and subscribed before me the undersigned authority, this the 2nd day of June, 1971.

s/ Bruce H. Hood
NOTARY PUBLIC

FILE COPY

FILED

MAY 8 1972

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-653

THOMAS S. GIBSON, ET AL.,
Appellants,

VERSUS

L. M. BERRYHILL, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

SUPPLEMENT TO JURISDICTIONAL STATEMENT
(Late Authorities—Rule 41)

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Date: May _____, 1972

UNDERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

AUTHORITIES

CASES:

Geiger, Dr. Hugh S., Jr. v. Dr. B. H. Jenkins, President of the State Board of Medical Examiners of Georgia, et al., 316 F. Supp. 370 ..... 4, 5-9, 9

Henry v. Claiborn Hardware Co., 444 F.2d 1300 (decided June 23, 1971) 3, 10

State v. Keel, Ala., 35 So.2d 625 9

STATUTES AND MISCELLANEOUS:

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(Late Authorities—Rule 41)

INTRODUCTORY PARAGRAPH

This Supplement to the Jurisdictional Statement, now pending before this Honorable Court, is filed pursuant to Rule 41 in order to invite attention to late decisions we believe will be helpful to the Court.

STATEMENT

The optometrists employed by Lee Optical Company of Alabama, Inc. (hereinafter referred to as Lee Optical) are the plaintiffs below and appellees in this appeal and for ease of reference will be referred to hereafter as plaintiffs.

The State Board of Optometry, defendant below, together with the members of the State Board and other named defendants will be hereafter referred to as defendants and the State Board of Optometry will be referred to as State Board.

In order to make this Statement more meaningful and to pinpoint the question involved, we invite the Court's attention to the following found in the opinion of the trial court:

> "The initial question in this case is whether this is such a situation as will require or permit federal intervention to restrain actions of a state court or administrative body. The Supreme Court in several recent cases has indicated federal reluctance to intervene, even to secure federal constitutional rights, in state judicial or administrative proceedings unless particular harassment or irreparable injury will result from the state proceeding. The Court in *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), held that there is no irreparable injury if the threat to the plaintiff's federally-protected rights can be eliminated by defense of a single criminal prosecution, that 'our federalism' ordinarily precludes an injunction against pending state criminal proceedings, and that the federal courts ordinarily should not intervene by injunction even to protect federally-protected rights without any showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief, 91 S.Ct. at 755. While dicta in *Younger* may indicate that the rule of that case does not apply in civil cases, no distinction is made between civil and criminal cases by Congress in the anti-injunction act, 28 U.S.C. 2283. However, it has been held that this statute is not applicable to State administrative proceedings, *Engleman* v. *Cahn*, 425 F.2d 954."

The State Board (appellants) cited the case of *Henry* v. *Claiborn Hardware Co.*, 444 F.2d 1300 (decided June 23, 1971), wherein the 5th Circuit Court of Appeals had reversed the lower court and dissolved the injunction and directed dismissal which would send the case back for trial in state court. This suit was instituted in federal court upon the filing of the case in state court. This was on appeal when our Jurisdictional Statement was filed. We urged that this *Henry* case, as well as others cited, supported the Motion to Dismiss as filed by the State Board and reversal of the injunction granted by the trial court.

This appeal has now been acted upon by this Honorable Court as indicated in 40 L.Wk. 3469 on March 27, 1972, as follows:

> "The petition for a writ of certiorari is denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Mr. Justice Marshall took no part in the consideration or decision of this petition."

This action on this appeal sent the *Henry* case back to the state court for disposition just as the State Board has urged throughout the entire proceedings of this pending case, to-wit: for hearings before the State Board or for such action in state court as Lee Optical (appellees) felt warranted.

There is another recent case in which both the three-judge trial court and this Honorable Court reach an opposite conclusion based on the facts, procedure and law identical to those in the case at bar and dismissed the suit filed in federal court.

The case of *Dr. Hugh S. Geiger Jr.* v. *Dr. B. H. Jenkins, President of the State Board of Medical Examiners of Georgia, et al.*, 316 F.Supp. 370, involved charges filed before the State Board of Medical Examiners. The procedures for handling such charges and a hearing before the Board are the same as those of Section 206 under attack in this case. The Georgia Optometry Law, Sec. 84-1110, is as follows:

"84-1110. Refusal and revocation of certificates of registration; grounds; hearing; appeal.—The Board of Examiners in Optometry shall refuse to issue its certificate of registration and may revoke its certificate of registration issued to any person who is not of good moral character, or who commits an act involving moral turpitude, or who is guilty of highly unprofessional conduct, or whose certificate was issued through error, fraud, or perjury: Provided, that in all such cases the board shall serve written notice of the charges on such accused person at least 10 days prior to the date set for hearing, and said person shall be notified to appear before the board to answer the charges at such time and place as the board may direct. Such notice shall plainly set forth the charges made, and notify the accused person to appear to answer the same. On such hearing, if the charges are found true, the accused having the right to produce witnesses in his behalf and cross-examine those testifying against him, the board shall render judgment after such hearing, and the person accused may enter an appeal to the next superior court of the county in which the hearing is held, if he is dissatisfied with the finding, such appeal to be governed by the law relating to appeals in other cases.

"(Acts 1933, pp. 202, 203.)"

Section 206 of the Alabama Optometry Law is shown on page 4 of our Jurisdictional Statement and in full as Appendix B. An examination of Section 206, dealing with the handling of charges, and those described in *Geiger* will show them to be virtually the same in every respect.

In the *Geiger* case, *supra,* the three-judge trial court held the pending charges to be penal in nature and subject to the prohibition of the Federal Anti-Injunction statute, 28 U.S.C.A. 2283, just as interference with state criminal proceedings were prohibited, and dismissed the case since the charges before the Board were pending at the time the Federal Injunction suit was filed. We feel this case to be of such importance in passing on the plea of the State Board to reverse the trial court herein and dismiss this case, we quote as follows from the *Geiger* case, *supra* (later upheld by this Honorable Court as we will show).

> "This action for damages and for declaratory and injunctive relief is brought under 28 U.S.C. § 1343 for claims allegedly arising under 42 U.S.C. §§ 1983, 1985, and 1988. An injunction against the enforcement of the state statute which regulates revocation of licenses to practice medicine (Ga.Code Ann. § 84-916) is sought on the ground that the statute is unconstitutional on its face, and a three-judge court has been convened pursuant to 28 U.S.C. § 2281.
>
> "Plaintiff is a medical doctor who has been licensed to practice medicine in the State of Georgia since shortly after his graduation from Emory University Medical School in June 1950, and who has practiced in this State continuously since June 1, 1956. Defendants are members of the State Board of Medical Examiners of Georgia, certain named employees of that board, certain named members of the East Point Police Department, an investigator for the District Attorney of

Fulton County, and certain private individuals who allegedly acted in concert with the named state officials.

"The record shows that on February 18, 1970, the Board of Medical Examiners issued to plaintiff a notice that the Board had been presented with charges that plaintiff had engaged in conduct which might constitute grounds for suspension or revocation of his license to practice medicine. The charges were based on affidavits which were attached to the notice. In general, plaintiff was charged with having solicited, committed, or otherwise participated in acts of sodomy, unlawful sales of dangerous drugs, use of stolen credit cards, theft by receiving stolen property, and various other unlawful acts. The notice stated that a hearing on these charges would be held on March 11, 1970, and plaintiff was informed of his right to controvert the charges, to raise any defenses he wished, to be represented by counsel at the hearing, to respond and present evidence on any relevant issue, and to subpoena witnesses and documentary evidence through the State Board of Medical Examiners. On March 10, 1970, plaintiff filed the instant suit and on May 11th a hearing was held before the three-judge court, after which the parties were allowed additional time within which to file briefs.

"The gist of his attack upon the statute appears to be that it is vague and overly broad on its face and that it gives to the Board of Medical Examiners unfettered discretion to suspend or revoke licenses to practice medicine. For the reasons set forth below we do not reach the merits of plaintiff's contentions with respect to the statute and the complaint will be dismissed on other grounds.

"[1, 2] First, since state proceedings were pending in the state courts and before the Medical Board at the

time plaintiff came into federal court, and since it is those proceedings with which plaintiff asks this Court to interfere, the anti-injunction statute, 28 U.S.C. § 2283,[1] precludes the granting of either declaratory or injunctive relief. *See* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); Brooks v. Briley, 274 F.Supp. 538 (N.D. Tenn. 1967), aff'd. per curiam, 391 U.S. 361, 88 S.Ct. 1671, 20 L.Ed.2d 647 (1968).[2]

"Federal courts must look to the law of the State to determine whether proceedings which were pending when suit was brought were judicial in nature. Hill v. Martin, 296 U.S. 393, 56 S.Ct. 278, 80 L.Ed. 293 (1935). Under Georgia law the statute which regulates revocation of licenses to practice medicine is a penal statute and the revocation proceedings themselves are in the nature of criminal proceedings. *See* Hughes v. State Board of Medical Examiners, 158 Ga. 602, 123 S.E. 879 (1924); State Board of Medical Examiners v. Lewis, 149 Ga. 716, 717, 102 S.E. 24 (1920). It follows, therefore, that since license revocation proceedings already had begun when the instant suit was filed, federal court interference with those proceedings is prohibited by the anti-injunction statute, just as interference with the state criminal proceedings is prohibited.[3]

"[4, 5] Here, as in Reetz, the plaintiff has challenged a state statute regulating activities in which the State has a vital interest. The right to practice medicine is a conditional right which is subordinate to the state's power and duty to safeguard the public health, and it is the universal rule that in the performance of such duty and in the exercise of such power, the state may regulate and control the practice of medicine and those who engage therein, subject only to the limitation that the measures adopted must be reasonable, necessary, and appropriate to accomplish the legislature's valid

objective of protecting the health and welfare of its inhabitants. *See* McNaughton v. Johnson, 242 U.S. 344, 37 S.Ct. 178, 61 L.Ed. 352 (1917); Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889); 41 Am. Jur., Physicians and Surgeons, §§ 3-8. It is beyond dispute that the power of the State to regulate the practice of medicine includes the power to create an administrative board and vest in it the supervision of such regulation. Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

"[7] Equally without merit are plaintiff's claims that he has been denied due process and equal protection of the laws because charges which might well result in the loss of his license to practice medicine have been placed against him and because affidavits by 'known perjurers and narcotic addicts' formed the basis for these charges. To the contrary, the record shows that plaintiff has been afforded notice and an opportunity to be heard on the charges which have been made—a hearing which he seeks to prevent—and at this point it clearly cannot be said that he has been denied due process.

"Accordingly, the complaint is dismissed for failure to state a claim upon which relief can be granted."

[Footnotes omitted.]

This Honorable Court affirmed the dismissal of the *Geiger* case as follows:

"No. 5952. HUGH S. GEIGER, Jr., Appellant, v B. H. JENKINS, President of State Board of Medical Examiners of Georgia, et al.

"401 US 985, 28 L Ed 2d 525, 91 S Ct. 1236.

"March 29, 1971. Appeal from the United States District Court for the Northern District of Georgia. The judgment is affirmed. Younger v Harris, 401 US 37,

27 L Ed 2d 669, 91 S Ct. 746; and Samuels v. Mackell and Fernandez v Mackell, 401 US 66, 27 L Ed 2d 688, 91 S Ct 764.

"Same case below, 316 F Supp 370."

In the case of *State* v. *Keel*, Ala., 35 So.2d 625, shown in our Jurisdictional Statement, page 22, it clearly appears that Alabama has declared that charges such as pending before the Alabama State Board are criminal offenses just as did the Georgia courts hold that charges pending before the State Board under the statute which regulates revocation of licenses to practice medicine to be penal statutes and the revocation proceedings themselves are in the nature of criminal proceedings. *Geiger, supra.*

We now are confronted with the situation where the Georgia three-judge court dismissed the case filed in *Geiger, supra*, under quite similar revocation procedures to that in Alabama, because charges were filed before the federal injunction suit; and in *Geiger* the trial court, and later this Honorable Court, by affirming the *Geiger* case, held that such charges and revocation proceedings before the Board were penal in nature and the anti-injunction statute, *supra*, prohibited interference with such proceedings. But in the Alabama case the three-judge trial court held exactly the opposite, even though the Alabama courts held such proceedings criminal in nature, and not only granted an injunction but passed on the merits of the case as well. All this in the face of the Motion to Dismiss by the State Board and other defenses raised by the pleadings.

Now this Alabama *Gibson* case is before this Honorable Court for decision. It is also of significance to note that

this Honorable Court has denied certiorari in the appeal of the *Henry* case, *supra*, in which the 5th Circuit Court reversed the lower trial court and directed a dismissal of the case and return to the state court for further proceedings.

It is urged that the trial court appears to have based its opinion on its conclusion that charges preferred against a licensed professional in Alabama to be heard by the licensing board are administrative in nature and the anti-injunction statute (28 U.S.C.A. 2283) does not apply and its opinion rendered herein clearly so indicates this erroneous conclusion.

CONCLUSION

It is submitted that the decision of the three-judge district court is not supported by law and the facts in this case as shown by decisions of this Court, other federal courts and state courts. The State Board urges this Honorable Court to reverse the order of the trial court granting an injunction herein and direct a dismissal of this case so the issues involved can be tried in an orderly manner under the laws of Alabama.

Respectfully submitted,

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Date: May _____, 1972

CERTIFICATE OF SERVICE

I, Richard A. Billups, Jr., one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of May, 1972, I served three copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States, on all parties required to be served, by depositing copies of such Jurisdictional Statement in the United States Post Office, properly addressed, with first class postage prepaid, as follows:

1. On Honorable Harry Cole
   P. O. Box 116
   Montgomery, Alabama 36101

2. On Honorable Douglas E. Bergman
   Mercantile Bank Building
   Dallas, Texas 75201

Richard A. Billups, Jr.